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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

GREGORY P. O'KEEFFE, Individually and as Administrator, etc.,

Plaintiff and Respondent,

v.

RONALD DALEY et al.,

Defendants and Appellants.

A109762

(San Francisco County Super. Ct. No. 418359)

Gregory O'Keeffe, administrator of the estate of decedent Gertrude D. Daley, initiated this action for declaratory relief to resolve persisting disputes among her heirs. Two of the heirs, Ronald Daley and Carolyn Daley (Ronald and Carolyn, respectively), have appealed, urging that we reverse that portion of the judgment that confirmed a sale of estate real property—known as 1326-1328 25th Avenue, San Francisco (the 25th Avenue property)—to purchasers John and Sandy Tom (the Toms). Ronald additionally requests that we reverse the judgment's award of $114,197 against him for "debt" owed to the estate.

As discussed below, we reverse the award of $114,197 against Ronald and affirm the confirmation of the sale to the Toms.

Background[1]

Gertrude D. Daley died intestate in March 1994. One year later, the probate court of the San Francisco Superior Court appointed Gregory O'Keeffe to act as administrator of her estate. The decedent's four children—Ronald, Carolyn, Philip Daley (Philip), and Pamela Keyes (Pamela)—were identified as the heirs at law in the ensuing probate proceeding (Super. Ct. Case No. PES-94-262684). (See Prob. Code, § 6402, subd. (a).)[2]

These heirs became embroiled in "severe disagreement and dissension," raising numerous claims against one another. In some instances one or two of the heirs claimed that another heir owed the estate money, offsetting that heir's share of the estate. In other instances one heir claimed an ownership interest either in personal property found on estate premises or in real property nominally held by the estate. The heirs divided into two camps over most, if not all, of these disputed claims, with Ronald and Carolyn in one and Philip and Pamela in the other. Because of this ongoing sibling conflict, over 10 years have elapsed without any final settlement in the underlying probate proceeding.[3]

In July and September 1995, O'Keeffe submitted petitions for instructions seeking "clarification from the [probate] court." In these he initially defined the heirs' claims against one another, so that they might "come forward" for judicial resolution. The heirs apparently failed to present evidence or otherwise pursue a final judicial determination of most of these claims. Nevertheless, the probate court eventually conducted a hearing on the petitions and resolved some of the issues raised. Chief among these concerned the disputed validity of certain "gifts of interests in the . . . 25th Avenue property." (See § 850, subd. (a)(2)(C).) The decedent, a few months before her death, had executed five documents, each entitled "Notice of Gift" (the gift notices). In doing so she apparently

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1 We find it necessary to set forth in some detail the convoluted proceedings and conflicting contentions of the parties that are spread throughout the voluminous and complicated record before us.

2 Further statutory references are to the Probate Code unless otherwise specified.

3 We observe, however, that this delay in closing this estate is in part due to the lack of decidedness and management on the part of the probate court.

sought to give partial interests in the 25th Avenue property—in the amount of $10,000 each—to Ronald, Carolyn, Philip, and two grandchildren. Each of the gift notices set out the decedent's express intent to have the 25th Avenue property appraised, so that each $10,000 interest could be converted to a fractional interest in the property based on its current market value. Evidently the decedent died before completing an appraisal of the property. In any event, the probate court, on February 28, 1996, entered an order (the February 1996 order) in which it determined that the gift notices were not valid because the decedent had never "completed [the] transfers of . . . interest[] in [the] property."

This order was immediately appealable. (Former Prob. Code, §§ 7240, subd. (h) (Stats. 1994, ch. 806, § 23), 9860 et seq. (Stats. 1990, ch. 79, § 14); now see §§ 850, subd. (a)(2)(C), 1300, subd. (k), 1303, subd. (f); see also Code Civ. Proc. § 904.1, subd. (a)(10).) Some six weeks after its entry, however, O'Keeffe and the heirs entered into a stipulation to the effect that the February 1996 order would "remain open for purposes of appeal." Their apparent intent was to permit aggrieved parties to obtain review of all challenged rulings in a single appellate proceeding to be initiated after the final settlement of the estate. These parties learned only belatedly that such a stipulation cannot give an appellate court jurisdiction over an otherwise untimely appeal. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 666.)

In the final weeks of 1996, O'Keeffe published, served, and filed a notice of intent to sell the 25th Avenue property. (See § 10300 et seq.) This notice called for a private sale and requested written, sealed bids that O'Keeffe was to open and consider on January 21, 1997. The notice specified that the 25th Avenue property would be sold "on an 'as is' basis, except as to title," and that the sale would be for "all cash, or on terms acceptable to the Administrator and to the Superior Court." The notice reserved to "[t]he Administrator" a right "to reject any and all bids prior to entry of an order confirming the sale."

O'Keeffe conducted the sale as scheduled. The highest bid was from the Toms. It was in the amount of $456,789 cash and included a check for 10 percent of that amount.

O'Keeffe subsequently filed a report with the probate court, indicating his acceptance of the Toms' bid and seeking confirmation of the sale. (§ 10308, subd. (a).)

On February 14, 1997, five days before the scheduled date of the confirmation hearing, Ronald recorded the gift notices that the decedent had executed in favor of Carolyn and himself.

At the confirmation hearing on February 19, 1997, Ronald[4] proposed to make an overbid for the 25th Avenue property, on behalf of Carolyn and himself. This bid was to be in the amount of $480,128. (See 10311, subd. (a).) O'Keeffe explained at the outset of the hearing that he understood the proposed overbid to consist of an offer of cash for one-half of the bid's amount with the remainder of the amount covered by application of their combined interests in the 25th Avenue property, as two of the four heirs to the estate. O'Keeffe told the court that the other two heirs, Philip and Pamela, had "indicat[ed] that they ha[d] claims against Ronald." According to O'Keeffe, the probate court in earlier proceedings had deferred decision on some of these claims, while others had been communicated to him but had not yet been presented to the court. O'Keeffe stated "it would be awkward" for him to accept the overbid under these circumstances, and he thought the claims required judicial resolution before he could accept a bid that "include[d] a distribution."

The court then addressed Ronald, indicating that he would "have to have the money here and now to make the [over]bid properly." Ronald said he "understood," but added there was "a problem that should forestall this sale." This was the "gift interest[s]" that the decedent had given to Carolyn and himself. O'Keeffe pointed out that the probate court had previously ruled that these "gift interests were not valid," but that an appeal of that ruling—the February 1996 order—had been "left open." The court repeated to Ronald that he had "to be able to do the deal now" and that it would not confirm his proposed overbid "with all these contingencies."

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[4] Ronald is a licensed real estate broker.

O'Keeffe stated again that the estate's acceptance of the proposed overbid was a "problem" due to the claims of the "other heirs." Ronald argued that the claims against him "lack[ed] any merit." While admitting that their resolution was "for the court to decide," he complained that Philip and Pamela had not raised these claims "in a timely manner" but were using them to block his efforts to purchase estate property.

At this point, O'Keeffe suggested a continuance, adding that he "would like to have [the proposed overbid] in writing" "to make it clear what it is that [Ronald is] really suggesting." He said that "on the other hand," he did not want to lose the "purchaser" whose bid he had returned for confirmation. The court replied that it was the estate's decision. O'Keeffe asked the Toms' agent if he would consent to a two-week continuance, but the agent indicated he could not without first consulting the Toms, who were not present at the hearing. The court wondered whether two weeks would be enough to resolve the claims in any event. O'Keeffe suggested that such resolution was unlikely, since the claims had remained unresolved "for a year and a half." However, he might at least "get[] a structure of [the overbid] to see really what Ronald is talking about."

Philip, who was present at the hearing, interjected that he and Pamela had asserted claims against Ronald "for upwards of $400,000 in various lawsuits." He stated that the probate court, in an earlier proceeding, had decided to defer the resolution of such claims until the estate assets had been reduced to "a dollar amount." He objected to the proposed overbid because it would allow Ronald to "get his portion now."

The court concluded that the proposed overbid was "invalid" and that it would confirm the Toms' bid. It determined that a continuance was not appropriate, noting that, if Ronald was "in a position" to make a cash overbid, "this is the time and place to do it." Ronald responded that he "agree[d] with what [the court was] saying," but again raised the issue of Carolyn's and his "gift interest[s]" in the property, stating that these "ha[d] been recorded." He claimed that because of this interest, O'Keeffe did not have "a hundred percent of [the property] to sell." The court requested clarification, and O'Keeffe explained that Ronald had, a few days earlier, recorded "notice[s] of gift"

purporting to confer a "$10,000 interest in the real property that we're trying to sell." He reiterated that a previous court order—the February 1996 order—had invalidated these gifts but that this order was "still subject to an appeal [that] has been left open-ended." The court replied: "So we sell it, and he either gets the $10,000 or he doesn't. . . . It has nothing to do with the title." Ronald responded: "It does cloud title."

The court then repeated that it was "going to confirm the bid [that has been] returned to court" because there was no "valid overbid." Ronald posed a final objection, again mentioning the "gift" interests, but the court confirmed the Toms' bid for the record and concluded the hearing.

O'Keeffe submitted a proposed written order of confirmation two days later. The probate court, however, never entered any written order following the confirmation hearing, either to confirm the sale to the Toms or to make any other disposition.

Some weeks later, O'Keeffe sent a letter to the Toms informing them that he could not complete the sale. Because of a "cloud on title" he could not obtain the necessary title insurance. He offered to refund their 10 percent deposit if they preferred "to back out of [the] transaction." The Toms promptly replied by letter, stating they were "not backing out." They agreed to have their deposit placed in an interest-bearing account while "waiting for resol[ution] . . . from the court."

The following week, O'Keeffe submitted a petition seeking instructions from the probate court. The petition alleged that the sale of the 25th Avenue property to the Toms had been "confirmed" on February 19, 1997, but he was unable to obtain title insurance because of the gift notices Ronald and Carolyn had recorded. As the sale could not be completed without title insurance, the petition requested that the court "vacate the sale" or alternately resolve the cloud created by the recorded gift notices and "allow the sale to proceed." If the sale were vacated, the petition sought instructions concerning Ronald and Carolyn's ability to bid for the property using a "credit . . . for their one-half interest" in the proceeds of the sale.

The petition for instructions also specified the claims Philip and Pamela had raised concerning Ronald's liability to the estate, and requested instructions regarding their

resolution. These claims were as follows: Ronald owed the estate for rent based on his continued occupation of estate property on 24th Avenue in San Francisco (the 24th Avenue property) following the death of the decedent; he owed the estate for loss of rental income and fair market value arising from damages he caused to this property; he owed the estate for various losses incurred in connection with another estate property (the Cerritos Avenue property) as to which Ronald had claimed an ownership interest; and he owed the decedent, and hence the estate, a debt of $175,000. This last claim, regarding debt in the amount of $175,000, was based on testimony Ronald had given in an earlier, unrelated action that had been brought against Ronald and the decedent for fraudulent conveyance. Ronald had allegedly testified that he had conveyed certain real property to his mother "in consideration for forgiveness of a debt" of $175,000.[5]

O'Keeffe filed another petition for instructions in September 1998. This petition essentially repeated the issues set out in the earlier petition for instructions. It also stated some additional claims by Philip and Pamela for amounts that Ronald allegedly owed the estate. In particular, it alleged that Ronald, in defending against the earlier action for fraudulent conveyance, had "judicially admitted" to a debt owed to the decedent in the amount of *either* $175,000 *or* $300,000.

The probate court never entered any order directly addressing the issues raised in these petitions for instructions. O'Keeffe and the heirs eventually agreed to submit the issues to an arbitrator, and in January 1999 the probate court entered an order authorizing such arbitration. The arbitrator suggested mediation for some of the issues. After a number of meetings, mediation efforts were "terminated" due to "certain actions" by the heirs. No mediation or arbitration award ever issued.

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[5] The plaintiffs in that case were neighbors who had brought an action against Ronald for damages for a nuisance arising from a run-down property. In a subsequent action, brought pursuant to Civil Code section 3439 et seq., they alleged Ronald had fraudulently conveyed to his mother the title to both the run-down property and another parcel, in order to evade satisfaction of the judgment that was eventually entered against him in the nuisance action. A jury verdict determined that Ronald had, in fact, made fraudulent conveyances of these properties. (See *Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1674-1675.)

After the arbitration and mediation efforts failed, sometime in 2002, O'Keeffe and the heirs discussed a "recommendation"—apparently from the arbitrator—that they submit some of the disputed issues to the civil department of the superior court by way of a complaint for declaratory relief. It appears that the parties to the probate proceeding agreed to this approach, and that the probate court itself "directed" O'Keeffe to file such a complaint.

On March 14, 2003, over six years after the February 1997 confirmation hearing, O'Keeffe filed a complaint for declaratory relief on behalf of the estate. The complaint named the four heirs and the Toms as defendants. It alleged the sale of the 25th Avenue property to the Toms and its confirmation by the probate court. It alleged the estate's inability to complete the sale by conveying clear title, because of gift notices recorded by Ronald and Carolyn. The validity of the gift notices, according to the complaint, was "[a]t issue." Finally, it alleged Ronald was claiming he had been "prevented from increasing the bid" on the 25th Avenue property at the February 1997 confirmation hearing. The prayer was for an order "determining the rights of the parties as to the sale of [the 25th Avenue] property," and the "interest" of Ronald, Carolyn, and all other parties in that property.

In September 2003, Ronald and Carolyn filed separate answers to the complaint. Their allegations were similar. For example, each alleged the probate court had "wrongfully disallowed" the "valid" overbid Ronald made at the February 1997 confirmation hearing. They also alleged that Ronald or Carolyn had not received proper notice of O'Keeffe's decision not to accept their overbid, and that had they received such notice they would have made "other arrangements" to purchase the property. They denied the merit of the claims Philip and Pamela had raised against Ronald. They asserted the Toms were "precluded" from claiming an interest in the 25th Avenue property "on grounds of failure of consideration, laches, estoppel, waiver, [and] mistake." Both of their answers requested that the court "reinstate[]" their overbid and "confirm[] the sale" of the property to Ronald and Carolyn in the amount of their overbid. They otherwise sought a declaration of the respective rights and interests of the parties with

respect to the 25th Avenue property, and "[s]uch other relief as the court deem[ed] proper."

Philip and Pamela filed a joint answer in October 2003. It asserted, among other things, that the Toms were precluded from enforcing any contract to purchase the 25th Avenue property by virtue of the lapse of the applicable statute of limitations, laches, unclean hands, and estoppel.

The Toms filed their answer admitting most of the allegations of the complaint, except that it denied that the validity of the gift notices was at issue, alleging that the probate court had previously held them to be invalid. It also denied Ronald had been "prevented" from making an overbid at the February 1997 confirmation hearing, alleging that the probate court at that hearing had determined the proposed overbid to be "invalid." The Toms requested that the court "quiet title" and declare the rights of the respective parties.

Meanwhile, in the still pending probate proceeding, the probate court directed O'Keeffe and the heirs to meet and confer to "consolidate" unresolved issues relating to the estate. As a result these parties signed a stipulation in March 2004, entitled "Agreed Trial Issues" (stipulation for trial). This stipulation for trial specified issues to be adjudicated either in the still-pending probate proceeding, in the now-pending separate action for declaratory relief, or in further arbitration. Those issues that the parties agreed to submit for determination in the declaratory relief action were the "Gift deeds and status of the 25th Avenue property" and a "$300,000 debt of Ronald . . . owing to the Estate arising from debt to his Mother." There was a proviso that, if either of these issues were not decided, they would be "reserved for later decision in this probate" proceeding. Matters reserved for resolution in the probate proceeding included the issue of "property damage" to the 24th Avenue property, where, as noted above, Ronald had resided with his mother.

In early October 2004, the trial court commenced an 11-day bench trial of the declaratory relief action. O'Keeffe's position, as disclosed by his trial brief, was that the gift notices recorded by Ronald and Carolyn were invalid and should be expunged. He

also argued he had properly rejected the proposed overbid made by Ronald and Carolyn, as it had not been an all-cash bid. On the other hand, O'Keeffe sought for the first time to disaffirm the estate's sale of the 25th Avenue property to the Toms. He argued the court should not confirm that sale, because the Toms had not timely pursued their rights as purchasers. Moreover, since the property had greatly appreciated in value,[6] it was in the best interest of the estate to conduct a new sale.

Philip and Pamela, in their initial trial brief, argued that the probate court had never confirmed the sale of that property by written order, and that the Toms had never asserted any right to that property until they filed their answer to the complaint for declaratory relief. They reasoned that the four-year limitation period set out in Code of Civil Procedure section 337 barred the Toms from making a belated assertion of contractual rights, and asked the court to declare that the Toms had no right or interest in the 25th Avenue property. In their closing trial brief, Philip and Pamela argued that the court should not confirm the proposed overbid made by Ronald and Carolyn, and that it should, pursuant to the stipulation for trial, find that Ronald owed the estate "$300,000 or such other sum as the court may find persuasive." They also urged that the court could not confirm the sale to the Toms because doing so would interfere with the probate court's jurisdiction.

Carolyn, in her trial briefs, argued that the sale to the Toms should not be confirmed because the Toms had no enforceable agreement and had not timely pursued their rights, if any, as buyers. She argued that the court should instead reinstate and confirm the proposed overbid made by herself and Ronald. Ronald essentially took the same position in his trial briefs, arguing at length that the court should confirm a sale of the 25th Avenue property to himself and Carolyn based on their proposed overbid. He additionally argued that the claims regarding his indebtedness to the estate had no merit.

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6 O'Keeffe testified that the market value of the 25th Avenue property, at the time of the trial in October 2004, was between $950,000 and $975,000.

The Toms' trial brief argued that the court should confirm the sale of the 25th Avenue property to themselves, and should not order a new sale simply because the property had increased in value after the February 1997 confirmation hearing.

During the trial, O'Keeffe testified that he was an attorney experienced in probate matters. He decided to sell the 25th Avenue property largely because of the heirs' "contentiousness." Under such circumstances he thought it best to liquidate the estate assets in order to facilitate a final resolution of disputed claims and distribution. O'Keeffe stated he had discussed the sale of property with all the heirs before issuing the notice of intent to sell, and that he had made it clear before the sale that only all-cash bids were acceptable to the estate. Later testimony by Philip was consistent with this account: Philip stated he received sufficient and clear notice that only all-cash bids would be acceptable.

O'Keeffe explained that an "all cash" sale was a normal procedure for a private probate sale, and one that was particularly appropriate given his decision to convert estate assets to a cash fund. O'Keeffe testified that he did not regard Ronald's proposed overbid to be an "all cash" bid, because the structure of that bid essentially called for a "credit" against Ronald's and Carolyn's "interest . . . in the property." He explained that he did not want to allow such credit bidding because of the heirs' disagreement concerning each other's interests in the estate. In his experience, O'Keeffe had never before encountered a "distribution" bid—which was how Ronald had described his proposed overbid. He could not regard Ronald's proposed overbid as one that assumed or implemented an actual distribution of Ronald's and Carolyn's interest in the property, because any actual preliminary distribution of those interests could be accomplished only by a court order following a noticed hearing. (See §§ 11601, 11620 et seq.) At the time of the sale, neither he nor any other interested party had initiated a proceeding to obtain such an order.

O'Keeffe testified concerning a letter he had received from counsel for Philip and Pamela after the sale of the property but before the February 1997 confirmation hearing. In this letter counsel cautioned O'Keeffe not to accept an overbid by Ronald if it

depended in "any amount" on estate assets Ronald expected to receive through distribution. This was because Philip and Pamela had raised "claims against [Ronald that] exceed[ed] any distributive share he [might] seek." O'Keeffe stated that when he received the letter he had "already made up [his] mind" to require all-cash bids. Nevertheless, O'Keeffe described the claims that Philip and Pamela had raised against Ronald as of the time of the February 1997 confirmation hearing. He stated that the claims, if valid, could have exceeded Ronald's interest in the remaining assets of the estate, and that he had considered this "factor" in rejecting Ronald's proposed overbid.

The claims that O'Keeffe described included the purported debt based on Ronald's testimony in the earlier, unrelated action for fraudulent conveyance. (See fn. 5 and accompanying text, *ante*.) Viewing a transcript of that testimony, O'Keeffe described the basis for the claim as "statements [by Ronald] under oath that he owed between $175,000 and $300,000 to his mother." In his view he could not disregard this claim at the time of the February 1997 confirmation hearing, because Ronald had not yet "fully explained" his testimony.[7] He did admit on cross-examination, however, that he never saw any instrument of indebtedness requiring Ronald to repay his mother "any . . . amount."

Among the other claims raised by Philip and Pamela was one alleging that Ronald owed the estate for the rental value of his continued occupancy of his mother's residence—the 24th Avenue property—for "some 19 months" following her death. O'Keeffe testified that he rejected this claim subsequent to the February 1997

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[7] The partial transcript was marked in evidence. In it, Ronald affirmed his statement in a previous deposition, that he had transferred his interest in certain real property to his mother because he "believed that [he] owed her . . . around $175,000." He testified he was "[n]ow . . . saying that [he] owe[d] her money in several different forms and it total[ed] in excess of $300,000," and that he had transferred the property "to relieve or to pay off [that] debt." He stated that the period of time during which he accumulated this debt "probably . . . started approximately in 1959, maybe '62, somewhere around there." When shown his prior testimony in the underlying nuisance action, Ronald agreed that he previously testified that the reason for the transfer was that he "felt that it would be a way to recompense [his mother] for all that she had done and possible future loss of assets that she may have in this [nuisance action] that [counsel for plaintiffs had] talked about joining her in." He also agreed he had previously testified that his mother had not "demanded this."

confirmation hearing. In light of the "terrible condition" of that residence at the time of the decedent's death, there was "really no rental value to it" during that period of time.

In response to questioning from the court, O'Keeffe agreed that, in his prior petitions for instructions, he had presented the claims raised by Philip and Pamela against Ronald, and had thereby given all the heirs an opportunity to present evidence either to establish or refute the legitimacy of these claims. Neither Ronald nor the others, however, had pursued this opportunity so as to obtain a "judicial determination" before the sale and the February 1997 confirmation hearing.

O'Keeffe also testified concerning another letter he had received before the February 1997 confirmation hearing. This letter was apparently written by Ronald but signed by both Ronald and Carolyn. It stated that Ronald had previously "discuss[ed] with [O'Keeffe] the possibility of [a preliminary] distribution" of his and Carolyn's interests in the 25th Avenue property. It noted that O'Keeffe had made a statement to Ronald the previous day that he "did not believe [he] could distribute [Ronald's] interest" because of the claims raised by Philip and Pamela. It stated these claims were "spurious," and asserted in addition that Ronald and Carolyn were not "willing to forego [their] opportunity to bid [on the property] with distribution." The letter concluded by inviting O'Keeffe to respond and "get together," in the event that this description of events was "in conflict with [O'Keeffe's] perception of reality." O'Keeffe testified that his statement to Ronald, to which the letter referred, was that he "could not allow a distribution." He thought the letter reflected Ronald's understanding that he "wasn't going to accept a distribution bid." O'Keeffe further stated he did not respond to Ronald's letter because he did not believe they could have "work[ed] out" a more acceptable overbid.

In concluding his direct testimony, O'Keeffe expressed his opinion as administrator that it was in the estate's best interest not to confirm the sale to the Toms, but rather to return their deposit and conduct a new sale. On cross-examination, however, O'Keeffe agreed that, shortly after the February 1997 confirmation hearing, the Toms had informed him of their desire to proceed with the sale notwithstanding the

potential delay, and that, prior to filing the complaint for declaratory relief, he had never tendered a return of the deposit nor made any other indication of intent to seek "relief from the contract." He affirmed that, during the time period between the February 1997 confirmation hearing and commencement of the declaratory relief action, he had never communicated to the Toms that they needed to take any affirmative action to protect their rights as buyers, and he agreed that the Toms had done nothing during that period to contribute to the delay in completing the sale.

Ronald testified that, in his view, the notice of intent to sell permitted a non-cash overbid so long as it was based on "terms acceptable" to O'Keeffe and the probate court. He suggested that O'Keeffe had never made it clear to him, until moments before the February 1997 confirmation hearing, that he would not accept Ronald's proposed overbid. O'Keeffe had, instead, merely expressed a belief that he could not make a preliminary distribution of Ronald's interest in the 25th Avenue property. During cross-examination, however, Ronald admitted that, while his "main objection" with regard to the rejection of his proposed overbid had been the absence of adequate notice, he failed subsequently to take any action on this ground to reopen the confirmation hearing. He also admitted that he knew O'Keeffe had never submitted a petition for preliminary distribution prior to the February 1997 confirmation hearing, yet he himself had made no attempt to obtain such a distribution by filing his own petition.

With regard to the gift notices, Ronald admitted he had recorded them after receiving notice of the February 1997 confirmation hearing and with the knowledge that the probate court had held them invalid. But, he stated that he did so not with the "intent to obstruct a sale" but only "to preserve an appellate right."

Concerning the claims against him made by Philip and Pamela, he expressed his opinion that they had no merit at the time, and that O'Keeffe had therefore improperly used them as a basis for rejecting his proposed overbid. In particular, he stated that the "debt" to which he had testified in the prior action for fraudulent conveyance was not based on any "actual enforceable debt" or "loans outstanding to [his] mother." On cross-examination, Ronald at one point stated that he had lived with his mother almost

continuously during his adult life, until her death in 1994. He remarked that he "probably should have moved out . . . at the age of 21" and that by continuing to live with her he "overstayed [his] welcome . . . by . . . 32 years." At another point, he testified he had never paid her for "board and room."

Carolyn testified, among other things, that she had authorized Ronald to make an overbid on her behalf at the February 1997 confirmation hearing. She also indicated that she and Ronald had previously sought to buy the 25th Avenue property well before the private sale, in 1995, by making a bid that similarly relied on a preliminary distribution of their respective interests as heirs, and that O'Keeffe had rejected this bid. She too, claimed she had not received advance notice from O'Keeffe that he would not accept their proposed overbid, and that had she known she "would have done something else."[8]

After the presentation of evidence, the court requested that the parties address the issue that Philip and Pamela had raised for the first time in their closing trial brief. Specifically, the court sought argument whether it should find that Ronald owed the estate a sum in the amount of $300,000 or some other amount.

In closing argument, counsel for O'Keeffe accordingly noted that his complaint had not requested any such finding or award, and that its consideration was not, therefore, "part of this case." He otherwise argued that the Toms had not acted diligently to protect their rights as buyers, but stated that the estate was willing either to convey title to the Toms, if the court should confirm the sale to them, or to sell the property anew for the benefit of the estate.

Ronald argued that Philip and Pamela had not raised the issue of his debt to the estate in their answer. He further insisted that he did not in fact owe the estate any

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8 The foregoing testimony was by no means all that the trial court entertained. We have summarized only that which seems most pertinent to our discussion below of the issues raised on appeal. The trial court gave the heirs, in particular, great latitude in providing additional testimony, so that there would be "no question that every party has had a complete hearing on the issues." Even when testimony arguably went beyond the matters placed in issue, the court on occasion let it come in over objection, because, as it once commented, it "simply [could not] be deprived of the opportunity to find out what really went wrong here."

money based on his testimony in the prior action for fraudulent conveyance. That debt, he argued, had merely been a "moral obligation" not based on any instrument of indebtedness or request for payment. He also argued that the probate court erred in rejecting his and Carolyn's proposed overbid, and after rejecting that bid, erred also in failing to order a new sale.[9] Counsel for Carolyn made essentially the same arguments. That is, the pleadings did not place in issue any finding or award regarding Ronald's debt to the estate, and the probate court erred, both in rejecting their proposed overbid and in failing to order a new sale.

Counsel for Philip and Pamela argued that the issue of Ronald's indebtedness in the amount of $300,000 was before the court based on the stipulation for trial, to which all parties to the probate proceeding had agreed. They argued that the fact that Ronald owed a debt to the estate was sufficiently proved by his testimonial "admission" to that effect. When the court asked counsel for a basis to calculate the amount owed, counsel replied that Ronald had "saved himself a great deal of money" by "living free off his mother for 20 or 30 years." The court commented that this seemed to be "the actual implication" of Ronald's "admission" in the action for fraudulent conveyance. With respect to the Toms, he argued that the court should direct that their deposit be returned and declare them to have no interest in the 25th Avenue property.

Counsel for the Toms, without addressing the issue of Ronald's debt to the estate, argued in essence that the equities favored his clients, and that the court should confirm the sale of the 25th Avenue property to them.

Finally, during rebuttal argument by O'Keeffe's counsel, the court asked further questions on the issue of Ronald's debt to the estate, and in response counsel conceded that Ronald might incur a debt to the estate "without the decedent knowing or making a demand," and that this debt might include the "rental value of [Ronald] living . . . rent

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[9] The latter argument rested on a premise that the proposed overbid met all statutory requirements for the court's acceptance and confirmation. In such a case, the probate court retains discretion to reject such an overbid, but if it does so it must order a new sale. (§ 10311, subd. (c).)

free with his mother" prior to her death, as well as "other household cost savings and . . . other loans that were never repaid."

On January 12, 2005, the court filed its judgment and a statement of decision.[10] The statement of decision, as subsequently corrected, made the following determinations. The court concluded that it had proper jurisdiction to adjudicate the parties' rights to the real property in issue, to determine the enforceability of any contract, to determine the timeliness and merit of requests to reopen the February 1997 confirmation hearing, and to confirm the sale "based on the existing record" of that hearing. It based this conclusion on its broad powers to provide "complete relief to the parties" in an action for declaratory relief, as well as its general jurisdiction concurrent with that of the probate court.

The court concluded there was a "binding contract" formed by the Toms' written offer and tender of deposit, by its acceptance by O'Keeffe on behalf of the estate, and by O'Keeffe's filing of a verified petition to confirm the sale. The court found that, consistent with this conclusion, both O'Keeffe and the Toms had at all times treated the transaction as binding.

The court noted the probate court had orally confirmed the sale during the February 1997 confirmation hearing. It "infer[red]" that the probate court's failure to enter a subsequent written order was due to "the effect of the two bogus liens." These "created a cloud on title and prevented the court from confirming the sale . . . as it was originally presented." It noted that the probate court's earlier order—the February 1996 order—had held the gift notices to be invalid. It concluded this order had been immediately appealable, and, as it had not been timely appealed, was now final. Thus the court directed that the recorded gift notices be expunged and that the estate's title to the 25th Avenue property be quieted.[11] The court further found that Ronald and Carolyn had

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[10] Philip and Pamela had filed a request for a statement of decision toward the conclusion of the trial. Subsequently O'Keeffe, Carolyn, and Ronald added their own requests. The Toms, for their part, submitted a proposed statement of decision.

[11] The court had entered an earlier order to this effect, in response to a motion for nonsuit made by the Toms.

recorded their respective gift notices "with knowledge" the probate court had held them invalid, "for the purpose of clouding title . . . and [had] thereby interfere[d] with the sale of the property to the Toms." It concluded that Ronald and Carolyn, by this wrongful conduct, were precluded from raising any equitable defense to enforcement of the contract between the estate and the Toms. The court noted the terms of the contract had required escrow to close within 30 days of confirmation of the sale. Based on the language of this provision and extrinsic evidence of the parties' behavior, the court interpreted the term to require closing within 30 days of any "written order" confirming the sale. The court concluded that, as no written order had yet been entered, the contract had remained executory. The court found, in the alternative, that even if there had been a breach of performance causing the statute of limitations to run, O'Keeffe, by his subsequent conduct and failure to raise the defense in his complaint, was either estopped from asserting the lapse of the applicable limitations period or had waived any right to raise that defense. O'Keeffe additionally could not assert laches as a defense to enforcement of the contract, because the estate had continued to collect rental income from the property and hence had suffered no prejudice from the delay in obtaining an order confirming the sale.

The court concluded that the confirmation proceeding should not be reopened, because none of the parties had brought a timely motion to do so under section 473 of the Code of Civil Procedure, and none had produced evidence otherwise sufficient to establish grounds to do so.

The court thus "considered the record of the February . . . 1997 confirmation hearing." It found that, at this hearing, Ronald "tried to make an oral credit overbid" for the 25th Avenue property, "apparently contingent upon his prevailing against certain claims being asserted against him." It found further that O'Keeffe "never advised" the probate court that this overbid was acceptable. It cited section 10311 for the proposition that a court "may not consider a credit overbid" unless the administrator has informed it

that that "overbid is acceptable to the estate."[12] The court concluded "upon this record" that the sale to the Toms should be confirmed.

Because the Toms would benefit from the property's appreciation in value since the February 1997 confirmation hearing, the court determined it was equitable for the estate to retain all interest earned by the Toms' 10 percent deposit. It also determined that the estate should retain the rental income earned by the 25th Avenue property since the time of the February 1997 confirmation hearing, as the Toms had made no claim for that income.

Finally, the court noted that Ronald "[b]y his own admission . . . recognize[d] [that] he owe[d] a debt to the estate, which stem[med] from living rent free for thirty-two years with his mother." Further, the court found that he had, in effect, misused the property in which the two had lived, resulting in "drastic deterioration" that deprived the estate of rental income following her death. The court thus found that Ronald "owe[d] a debt to the estate to compensate for the reduced value of the estate for which he is responsible."

In its judgment, the court confirmed the sale of the 25th Avenue property to the Toms pursuant to the petition for confirmation filed by O'Keeffe in January 1997. It further directed that the estate was to retain both the rental income from that property and the interest from the Toms' deposit. The court additionally "use[d] its equitable powers . . . to determine the total debt owe[d] to the estate" by Ronald. It ruled that Ronald owed the estate $114,197 "for decreased value in the estate." Noting that this amount was equal to one-fourth of the confirmed sale price, the court ordered that Ronald's one-fourth share of these proceeds was to be applied to extinguish the debt to the estate. With respect to this determination, the court's intent was to "curtail[] and render[] moot any

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[12] Section 10311 sets out the procedure for making an overbid at a confirmation hearing. The probate court must accept the highest such overbid, and confirm the sale of the property to that bidder, when certain requirements are satisfied. (§ 10311, subd. (a).) For example, in the event that the administrator has requested confirmation of a cash offer, and a higher offer "on credit" is made at the confirmation hearing, the administrator must "inform the court . . . that the higher offer is acceptable." Otherwise the court "may not consider" that overbid. (§ 10311, subd. (d).)

other litigation concerning the amount of [Ronald's] debt to the estate" either in the probate proceeding or any other proceeding.

This appeal followed.

Discussion

A. *The Statement of Decision*

Ronald seeks reversal of the judgment because the trial court failed to respond specifically to issues he listed in his two requests for a statement of decision. He notes the court apparently adopted the proposed statement of decision submitted by the Toms, and suggests it was error to do so without also addressing the issues raised by other parties seeking a statement.

Code of Civil Procedure section 632 requires a trial court, following a bench trial, to issue a statement of decision when a party has properly requested it. The statement must "explain[] the factual and legal basis for its decision as to each of the principal controverted issues at trial . . . ." (Code Civ. Proc., § 632.) A trial court need not address every question listed in a request for statement of decision. It is enough if its statement explains the factual and legal basis for its decision as to the "principal controverted issues." (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130.) A statement of decision was requested, and the trial court issued one. The statement adequately sets forth the basis for the court's decision on all principal controverted issues. Ronald has not demonstrated how the court's failure to address issues set out in his request renders the statement prejudicially defective. We find no reversible error on this point.

B. *Carolyn's Entitlement to Distribution of Estate Assets*

The court's judgment, in addition to those adjudications summarized above, ruled that Ronald and Carolyn "have no right, title, estate, interest, or lien whatsoever" in the 25th Avenue property. Carolyn complains that this ruling wrongfully excludes her from participating in any distribution of proceeds from the sale of that property.

This contention misreads the judgment. Elsewhere it provides expressly for Carolyn's participation in the distribution of assets resulting from the sale of the 25th

Avenue property to the Toms. The statement to which Carolyn refers immediately follows a ruling to the effect that the estate is "sole owner" of the 25th Avenue property. Plainly, the statement does not refer to the rights of any heirs to distribution of estate assets, but determines only that Ronald and Carolyn have no interest that is separate from their rights as heirs and adverse to the estate's sole ownership. As we have noted, Ronald and Carolyn claimed such a separate interest in their answers, arising from the gift notices executed in their favor. The challenged statement simply rules in favor of the estate as to these claims.

C. *Confirmation of Sale of the 25th Avenue Property*

1. *Standard of Review*

Both Ronald and Carolyn challenge the trial court's confirmation of the sale of the 25th Avenue property to the Toms, asking that we reverse that portion of the judgment. They also challenge, in effect, the trial court's implicit conclusion that the probate court properly rejected the proposed overbid they made at the 1997 confirmation hearing. That is, they both request that we "declare" or "deem[]" their 1997 proposed overbid to be a "cash" bid. Such a declaration presumably would require the probate court to accept and confirm their proposed overbid pursuant to section 10311, thereby precluding any confirmation of the Toms' lower cash bid. (See fn. 9, *ante*.) Ronald goes so far as to request that we order the *probate court* to confirm the sale of the 25th Avenue property to them on the basis of their proposed overbid, even though this appeal is not from a judgment entered by that court.

Ronald and Carolyn raise a variety of arguments apparently designed to support these related, if not interdependent, requests for appellate relief. However, before considering these issues, we find it necessary to clarify the nature of the challenged rulings, in order to determine our proper scope of appellate review.

As noted above, in its statement of decision the trial court stated that the February 1997 confirmation hearing "should not be reopened." The court instead purported to rely on "the record of the February . . . 1997 confirmation hearing" in reaching its conclusion to confirm the sale to the Toms. These statements are, however, belied by the record we

have summarized above. It is evident the trial court considered evidence relating to the totality of circumstances surrounding the sale of the 25th Avenue property and the February 1997 confirmation hearing. The parties variously argued that the trial court should confirm the sale to the Toms, confirm a sale to Ronald and Carolyn based on their proposed overbid, or require a new sale of the property, either by issuing its own judgment to that effect or by issuing a declaration binding on the probate court. The trial court acted by determining, implicitly, that O'Keeffe and the probate court had been justified in rejecting the proposed overbid made by Ronald and Carolyn. In effect, the court refused to confirm their overbid. The court acted additionally by including in its judgment a direct order confirming the sale of the 25th Avenue property to the Toms. In taking such action, the trial court clearly made equitable rulings that rested not only on the evidence of events that occurred before and during the February 1997 confirmation hearing, but also on events that occurred afterward to the extent that these concerned the conduct of O'Keeffe and the Toms with regard to their yet unconfirmed and unexecuted agreement. It appears to us that, in order to reach these determinations, the trial court necessarily reopened the uncompleted confirmation hearing begun in February 1997. Its own statements to the contrary, set out in its statement of decision, are not in the nature of a finding essential to its judgment, and may be disregarded as harmless surplusage. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 584.)[13]

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13 Similarly, the trial court stated in its judgment that it "decline[d]" to reopen the February 1997 confirmation hearing, on the basis of *Estate of Shorr* (1981) 122 Cal.App.3d 775). In that case, the probate court entered an order confirming a sale, but the sale was delayed pending appeal of the order. Following the appeal, which affirmed the confirmation order, the administrator petitioned to vacate that order because the property had appreciated in value during the intervening delay, and the administrator regarded the sale terms as no longer "fair" to the estate. The probate court denied the petition, and the court of appeal affirmed, stating that a confirmation order should not be set aside only on the basis of a showing, made after a delay occasioned by an appeal from that order, that the estate could now obtain a better price. (*Id.* at p. 777.) Thus, it appears the trial court in this case did not actually decline to reopen the confirmation proceeding *for the purpose of completing that proceeding.* In effect, the trial court did reopen the confirmation proceeding, but decided to complete that proceeding by confirming the sale to the Tom's, as distinguished from ordering a new sale on the ground that the property's value had increased during the six-year delay following the uncompleted February 1997 confirmation hearing.

Thus, our proper standard of review is that which applies to an order confirming or refusing to confirm a sale conducted pursuant to the Probate Code. Such an order is within the discretion of the probate court, and is to be affirmed if supported by substantial evidence. (*Estate of Da Roza* (1947) 82 Cal.App.2d 550, 553-554.)

2. *Jurisdiction to Confirm the Sale*

Carolyn claims the trial court lacked the proper jurisdiction to confirm the sale to the Toms. She reasons that, in doing so, the trial court improperly "assumed the responsibility of . . . the probate court, and acted in derogation of [that] court's jurisdiction" over its uncompleted confirmation proceeding in the underlying probate proceeding.

We conclude there was no fundamental lack of jurisdiction. When a superior court has a probate department, as in this case, the probate department has "primary" jurisdiction over probate-related proceedings, but a non-probate department maintains "secondary" jurisdiction in such proceedings. (*Harnedy v. Whitty* (2003) 110 Cal.App.4th 1333, 1344-1345; see § 800.) As outlined above, the probate department in the underlying proceeding initiated a confirmation proceeding in February 1997. Although it confirmed the sale to the Toms orally at the conclusion of the hearing, that department never completed the proceeding by issuing any written order. O'Keeffe subsequently filed two petitions for instructions, each time raising the issue of the sale, but that department still failed to address the issue. Instead, it authorized arbitration of the issue. Further, after arbitration failed to produce any decision, it apparently directed O'Keeffe to seek resolution of the issue by initiating an action for declaratory relief. (See § 801 (probate court "may order that an action . . . not specifically provided in [the Probate Code] be determined in a separate civil action").) A probate court has been deemed to have the inherent power—or primary jurisdiction—to reopen a confirmation proceeding in which no valid order of confirmation has been entered, when considerable time has elapsed, and the estate's interests would be promoted thereby. (*Estate of Herz* (1956) 147 Cal.App.2d 100, 106; see also § 1048, subd. (a) (probate court order must be "entered at length in the minute book . . . or signed by the judge and filed").) The

preferred procedure to invoke the probate court's jurisdiction in such an event appears to be by motion under Code of Civil Procedure section 473. (*Herz, supra,* at p. 106.) However, we are satisfied that, in the unique circumstances of this case, the trial court's civil department similarly had inherent power—or secondary jurisdiction—to reopen and complete a confirmation proceeding after the probate department had repeatedly failed to take such action.

Carolyn also argues the trial court erred in confirming the sale to the Toms, because this was an action for declaratory relief only. In her view neither the allegations nor the prayers in the parties' respective pleadings provided a basis for such non-declaratory relief as the order of confirmation.

"A court, in granting declaratory relief, has the power to award additional relief." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 901.) The extent of relief to be afforded in a declaratory relief action is within the trial court's discretion. (*Lortz v. Connell* (1969) 273 Cal.App.2d 286, 300.) "Quite apart from the pleadings . . . declaratory relief is equitable, and . . . a court of equity will administer complete relief when it assumes jurisdiction of a controversy. (*Laurance v. Security-First Nat. Bank* (1963) 220 Cal.App.2d 622, 626.) As noted above, Carolyn's answer, among others, prayed not only for declaratory relief but such "other" relief as might be appropriate. The issue whether or not to confirm the sale to the Toms was developed fully by the parties' trial briefs—including Carolyn's. She participated fully through her counsel in the litigation of this issue. Further, Carolyn herself asked the trial court, in her trial briefs, for relief in the form of an order confirming the sale to Ronald and herself on the basis of their overbid. Under these circumstances we conclude the court did not err, nor exceed its jurisdiction in this action for declaratory relief, when it afforded relief in the form of an order confirming the sale to the Toms. (See *Harnedy v. Whitty, supra,* 110 Cal.App.4th 1333, 1345.)

3. *The Right of Rejection Clause*

Carolyn points out that, under the notice of sale, the administrator reserved the right to reject any bid up to the time the court entered an order of confirmation. She

claims the court erred "in denying the Administrator['s] and heirs['] requests to reject the Toms' bid under [this] provision."

This argument has no merit. It includes no citation to the record to show that O'Keeffe ever invoked this provision. Neither in his complaint nor in his trial brief did O'Keeffe purport to do so. His testified that, before initiating the action for declaratory relief, he never sought to repudiate his prior acceptance of the Toms' bid. Further, in his trial brief, as in his testimony and argument, O'Keeffe sought only to show that, in his opinion, the Toms had delayed in taking steps to protect their interest in the 25th Avenue property. He reasoned on this ground that they ought to be barred by the applicable limitation period or by laches from seeking to confirm the sale of the property to them on the basis of their 1997 bid, and that to confirm that sale would "cause prejudice to the estate, since the property ha[d] doubled in value." In sum, O'Keeffe never explicitly invoked the right of rejection clause as a basis for avoiding the sale to the Toms.[14]

Carolyn's reliance on the decision in *Estate of Greer* (1968) 261 Cal.App.2d 827 is misplaced. In that case the administrator invoked a "right of rejection" provision to reject a written overbid because it did not conform to the terms of the oral overbid he had accepted in open court. (*Id.* at p. 828.) The appellate court noted that such a provision in the notice of sale permitted the administrator to reject a bid "*prior to acceptance.*" (*Id.* at p. 830, italics added.) Here it is unquestioned that O'Keeffe accepted the Toms' bid. His later attempt to avoid confirmation was not based on any subsequent variance in the terms of the bid, and it did not include any explicit attempt to repudiate acceptance on the basis of the right of rejection clause included in the notice of sale.

4. *The Enforceability of the Toms' Bid*

Carolyn contends there was no enforceable contract between the estate and the Toms in the absence of any written order confirming the sale. Alternately, if the Toms

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[14] If any of the heirs ever invoked this provision, as Carolyn suggested in her claim of error, she has again failed to show this event in the record. Nor has she explained why any heir, who was not also the administrator of the estate, would be entitled to invoke a right reserved to the administrator.

did have an enforceable contract, Carolyn urges that it was error to confirm the sale because the Toms failed to take timely action to preserve their contractual rights, either by an action for damages for breach or by suit for specific performance. She claims that the trial court erred in refusing to apply the lapse of the applicable statute of limitations, so as to preclude confirmation of the sale to the Toms, because the heirs were entitled to raise this defense.

We agree that, in a probate sale, there is no enforceable contract between the administrator and the bidder whose bid is returned to the probate court for confirmation, until that court actually enters a written order of confirmation. Although the probate court did not sign a written order confirming the sale (see §§ 1048, subd. (a), 10308, subd. (a)), once an administrator has accepted a bid for the sale of estate real property and has reported the sale to the probate court for confirmation, there is a binding agreement as between those parties. Absent confirmation, the binding nature of this agreement may not give rise either to an action for breach of contract or a suit for specific performance, but it does permit the party seeking to enforce the agreement the right to obtain an order of confirmation from the probate court, an order that *will* make the agreement fully enforceable. Thus a bidder may not avoid confirmation of a sale by attempting to repudiate an accepted offer simply because it has not yet been confirmed. (See *Estate of Klauenberg* (1973) 32 Cal.App.3d 1067, 1069-1070.)

The only pleading to raise the lapse of the statute of limitations was, as noted above, the joint answer filed by Philip and Pamela, which raised the bar of section 337 of the Code of Civil Procedure. That section provides in relevant part only for a defense against "[a]n *action* upon any contract obligation, or liability founded upon an instrument in writing . . . ." (Code Civ. Proc., § 337, subd. (1), italics added.) The Toms initiated no such action or suit, but merely asked the court to confirm the sale to them, so as to entitle them to compel a conveyance of title to the 25th Avenue property. (See § 10313, subd. (a).) The Probate Code requires that an administrator take prompt action to confirm a sale, and permits the buyers to seek confirmation if the administrator fails to do so. (See § 10308, subd. (b).) In this case, however, O'Keeffe complied with the statutory

requirements for seeking confirmation. There appears to be no Probate Code statute requiring the Toms to take further action in this situation. The probate court's failure to issue an order either confirming or vacating the sale is not a fault that can be attributed to the Toms. Again, we emphasize the unusual circumstances of this case, and conclude that raising the defense of section 337 of the Code of Civil Procedure did not preclude the Toms from seeking confirmation of the sale to them.

Finally with regard to the equitable defense of laches, we conclude that there was substantial evidence, as summarized above, to support the trial court's determination that this defense should not apply to bar confirmation of the sale to the Toms. While the Toms did not take earlier action to obtain confirmation, neither did the heirs. There was, in fact, substantial evidence for the court to conclude that Ronald and Carolyn, by recording the gift notices, actively attempted to obstruct and delay confirmation of the sale to the Toms.[15] O'Keeffe, for his part, did nothing to place the Toms on notice that they needed to take affirmative steps to protect their interest any sooner than they actually did.

We conclude the Toms were entitled to seek confirmation of the sale of the 25th Avenue property to them, pursuant to their agreement with O'Keeffe, and that their effort to do so in this action for declaratory relief was not barred either by the lapse of a statutory limitation period or by the equitable defense of laches.

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[15] The trial court found that the recordation of the invalid gift notices was "wrongful conduct." We agree. While the gift notices were sufficient to cloud the estate's title once they were recorded, these notices were not *deeds* that purported to convey legal title to the property. There was thus no necessity to record them in order to preserve a right to appeal, as distinguished from an attempt to forestall a sale that would convey title to third parties. Any appeal by Ronald and Carolyn, challenging the probate court's ruling that invalidated the gift notices, would not have been rendered moot by an order confirming the sale to the Toms. It is this point, we believe, that the probate court intended to express at the February 1997 confirmation hearing, when it commented that the gift notices "ha[d] nothing to do with the title." This comment followed the court's observation that, even if the property were sold, Ronald or any other person asserting an interest pursuant to the gift notices could still "get [his or her] $10,000" from the proceeds of the sale—assuming the notices were deemed valid upon an appeal of the challenged ruling.

5. *The Rejection of Ronald and Carolyn's Proposed Overbid*

Carolyn contends that it was error for the probate court, at the February 1997 confirmation hearing, to reject the proposed overbid that Ronald made on his and her behalf. She asserts that their proposed bid was not a credit bid as defined by section 10315.[16] She also claims O'Keeffe had no valid basis to refuse a preliminary distribution of her and Ronald's interests in the 25th Avenue property. Accordingly she reasons their proposed overbid was a cash bid—one not subject to O'Keeffe's approval and one the probate court was required to accept and confirm.

It is this point upon which Ronald focuses his arguments regarding the confirmation of the sale to the Toms. He complains that the probate court was misled by O'Keeffe, and hence that it erred when it orally rejected the proposed overbid he presented on behalf of Carolyn and himself. He, too, reasons that their proposed overbid was not a credit bid and that O'Keeffe had no valid basis to represent to the probate court that it was not acceptable to the estate. He urges that, to the contrary, O'Keeffe's actions violated his duty to the estate and its heirs.

While the proposed overbid made by Ronald and Carolyn may not have been a "credit" bid that included terms for deferred payment, such as are mentioned in section 10315, neither was it an "all-cash" bid of the type O'Keeffe had solicited for the sale of the 25th Avenue property. (See § 10307 ("bids shall substantially comply with any terms specified in the notice of sale").) Only half of the amount offered was cash. The other half consisted or Ronald's and Carolyn's potential, but as yet undistributed, interest in the 25th Avenue property.[17] At the time of the February 1997 confirmation hearing, no one had sought the necessary court order to effect that distribution.

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16 Section 10315 does not explicitly purport to define a "credit" bid for purposes of the Probate Code. In relevant part, it provides only that, when a *sale* is "made on credit," it must be structured so that the "unpaid portion of the purchase money" is secured by a trust deed subject only to preexisting liens or those approved by the court. (§ 10315, subd. (a).)

17 While title passes to heirs upon the death of the intestate decedent, possession is vested with the administrator, and title ultimately depends upon the administrator's final settlement of the estate. (See *Laurance v. Security-First Nat. Bank, supra,* 220 Cal.App.2d 622, 624-625.)

In accordance with the substantial evidence standard of review, we accept as true the testimony tending to support the trial court's findings and judgment, and disregard evidence to the contrary. (See, e.g., *In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) According to O'Keeffe's testimony, summarized above, he made it clear to all the heirs before the sale, and again after the sale but before the confirmation hearing, that only all-cash bids were acceptable to the estate.[18] He stated, in effect, that he had made it as clear as possible to Ronald that he did not regard his overbid to be an acceptable all-cash bid, because it required a preliminary distribution of Ronald's and Carolyn's interest in the 25th Avenue property, a distribution for which no one had yet sought the necessary order. (See §§ 11601, 11620 et seq.) O'Keeffe said further that he had already decided to require all-cash bids, as evidenced by his notice of sale, even before he received the

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[18] As we have noted, O'Keeffe regarded the sale as necessary because of the contentiousness of the heirs. This, of course, is a valid reason for determining whether it is in the best interests of the estate to sell real property as opposed to distributing undivided interests in that property. (*Estate of Da Roza, supra,* 82 Cal.App.2d 550, 554.) Ronald relies chiefly on the decision in *Estate of Canfield* (1951) 107 Cal.App.2d 682 (*Canfield*) to support his contrary argument, that O'Keeffe was *not* authorized to sell the 25th Avenue property merely because he thought the contentiousness of the heirs required a liquidation of estate assets for eventual distribution. In *Canfield,* the estate consisted of securities, cash and several parcels of real property. It was ready for final distribution, but the beneficiaries could not agree to take undivided interests in the parcels. The executrix therefore conducted a sale of one of the parcels, claiming it was in the best interest of the estate to liquidate that asset so that it could be distributed in cash. After the executrix accepted a cash bid from a third party, she rejected a subsequent offer by one of the beneficiaries, because it was not a cash bid. Rather, it was an offer to take the parcel as a portion of that beneficiary's distributive share. This beneficiary then made a timely objection to confirmation of the sale (see now § 10310, subd. (c)), and *also* submitted a timely petition for a partition pursuant to former sections 1100 and 1103 (see now §§ 11950 and 11953). (*Canfield, supra,* at p. 686.) The reviewing court reversed the probate court's confirmation of the sale, holding that the executrix's sale of the property was not in the estate's best interest, within the meaning of former section 754 (see now §§ 10000, 10003), simply because she wanted "to distribute cash." (*Id.* at p. 686.) The court held that, if a partition could be accomplished so as to allot the parcel to one beneficiary without causing great prejudice to the others, the probate court was required to proceed with the partition rather than to confirm the sale. (*Canfield, supra,* at pp. 686-687.) This case, however, bears no resemblance to *Canfield.* Here the estate was by no means ready for a final distribution at the time O'Keeffe conducted the sale. Moreover, Ronald did not make a timely objection to a sale—and here again we affirm the lower's court implied finding that he had sufficient notice beforehand that his "distribution" bid was not acceptable. More importantly, neither Ronald nor any other heir initiated a timely proceeding either for a partial distribution or for partition. Under the circumstances we conclude O'Keeffe acted well within the authority conferred by section 10000, subdivision (b), when he conducted the sale of the 25th Avenue property and sought its confirmation.

correspondence generated by counsel for Philip and Pamela, which, sent after the sale but before the confirmation hearing, cautioned him concerning the claims Philip and Pamela had raised against Ronald's interest in the estate. With regard to those claims, he testified that, whatever their merit, they were unresolved at the time of the February 1997 confirmation hearing, and for that reason he regarded them as potentially viable.

We conclude there was substantial evidence to support the trial court's implicit rejection of Ronald's and Carolyn's proposed overbid.

6. *Notice of O'Keeffe's Rejection of Ronald and Carolyn's Proposed Overbid*

Carolyn asserts that she never received proper notice that O'Keeffe would not accept the proposed overbid, and if she had, she "would have attended" the 1997 confirmation hearing to make a different bid not dependent on a preliminary distribution of Ronald's interest. Ronald weighs in on this point as well, claiming that he, too, did not receive timely notice of O'Keeffe's "unequivocal" intent not to accept their proposed overbid. He, too, argues that O'Keeffe had no reason to deny a preliminary distribution of their interests based on the claim that he, Ronald, owed the estate money. He, like Carolyn, contends that O'Keeffe had no reason in any event to deny Carolyn a preliminary distribution, and claims that O'Keeffe's lack of proper notice improperly deprived her of an opportunity to appear and make another, more acceptable overbid.

The evidence we have summarized included testimony by O'Keeffe, to the effect that he gave adequate notice to all the heirs that he would not accept bids dependent on any preliminary distribution. Philip testified in addition, that he, at least, clearly understood the notice O'Keeffe gave all the heirs, which was that only all-cash bids were acceptable to the estate. The trial court, as the trier of fact, implicitly accepted that testimony and rejected the conflicting testimony given by Ronald and Carolyn. We conclude that this testimony was sufficient to support the trial court's implied finding, that Ronald and Carolyn did receive adequate notice both of the confirmation hearing and O'Keeffe's intention not to accept their proposed overbid.

7. *Denial of Carolyn's Right to Adequate Appellate Review*

Carolyn argues that the trial court's sole reliance on the record of the February 1997 confirmation hearing effectively denied her "right of appeal." We find her reasoning on this point unclear. It also lacks any citation to supporting authority. In any event, we have determined that the trial court's conclusion on this point—that it was relying only on the record of the February 1997 confirmation hearing—was harmless error. The court did not, in fact, rely only on the record of the February 1997 confirmation hearing, but necessarily relied as well on the voluminous evidence of all the related circumstances that led to and followed that hearing. (See discussion in subpart 1, *ante*.)

In sum, we conclude the court did not abuse its discretion in confirming the sale of the 25th Avenue property to the Toms. There was substantial evidence to support the express and implied findings underlying this determination. (See *Estate of Da Roza, supra,* 82 Cal.App.2d 550, 553-554.)

D. *The Award to the Estate for Ronald's Purported Debt or Damages*

As previously noted, the trial court's statement of decision found that Ronald "[b]y his own admission . . . owe[d] a debt to the estate, which stem[med] from living rent free for thirty-two years with his mother," at the 24th Avenue property. The court found further that Ronald had misused the property in which he and his mother had lived—the 24th Avenue property—causing "drastic deterioration." It concluded Ronald "owe[d] a debt to the estate to compensate for the reduced value of the estate for which he [was] responsible." In its judgment, the trial court "use[d] its equitable powers . . . to determine the total debt . . . owe[d] to the estate" by Ronald, ruling that he owed $114,197 "for decreased value in the estate." This amount was the exact equivalent of Ronald's share in the proceeds of the 25th Avenue property, and the court directed that it be paid by extinguishing Ronald's interest in those proceeds. The trial court stated that this ruling was intended to preclude "any other litigation" regarding claims against Ronald and in favor of the estate.

Ronald objects to this award against him. He argues that the pleadings did not properly raise this issue. He complains also that O'Keeffe never sought to collect any amounts from him by pursuing a formal claim against him on behalf of the estate. He urges finally that the award is not supported by the evidence.

It is true that the pleadings, summarized above, never sought relief in the form of recovery of a money judgment for debt or damages against Ronald and in favor of the estate. As we have noted, Philip and Pamela raised this issue for the first time in their closing trial brief. In that brief, they requested an award in the amount of "$300,000 or such other sum as the court may find persuasive," pursuant to the stipulation for trial.

In the stipulation for trial, the parties to the underlying probate proceeding had agreed to submit to the civil department of the court, in the action for declaratory relief, the issue whether Ronald owed the estate the sum of "$300,000 . . . arising from debt to his Mother." This could only refer to the debt of $175,000 or $300,000, as to which Ronald had testified in the earlier, unrelated action for fraudulent conveyance. In this same stipulation for trial, the parties also agreed, among other things, to submit to the probate department the issue of Ronald's "[r]eimbursement to the Estate . . . for *rental* [and] *property damages*" relating to his occupancy of his mother's residence—the 24th Avenue property. (Italics added.)

The trial court did not ask the other parties to address the issue of the award sought in Philip and Pamela's closing trial brief until the time for closing argument, after the parties had already completed the presentation of their evidence on the issues framed by the pleadings. O'Keeffe's counsel, in response, stated initially that the this belatedly raised issue had never been "part of this case."

Subsequently, the trial court found that Ronald owed the estate a "debt" on the basis of "his own admission," made in the earlier action for fraudulent conveyance. The court found, however, that this debt specifically arose from Ronald's "living rent free for thirty-two years with his mother" and also from his misuse of her residence resulting in "drastic deterioration." In other words, the court actually based its award on Ronald's liability for "rental [and] property damage" in connection with the 24th Avenue property.

The pleadings did not seek recovery for such liability. Recovery on a cause of action not pleaded is improper even when it is disclosed by the evidence. (See *Tri-Delta Engineering, Inc. v. Insurance Co. of North America* (1978) 80 Cal.App.3d 752, 760.) Moreover, the stipulation for trial reserved the issue of such liability for the probate court's determination.

There are additional problems with the award. A *debt* owed by an intestate heir to the estate may be charged against that heir's interest in the estate. (§ 6410, subd. (a).) Case law, however, has limited this to situations involving a true indebtedness, that is, situations in which "there existed a relation of creditor and debtor between the deceased and the [heir]." (*Estate of Berk* (1961) 196 Cal.App.2d 278, 281.) A statute of limitations defense may be raised to preclude such an offset. (*Id.* at p. 288; see, e.g., Code Civ. Proc. §§ 337, 339.) This presupposes an indebtedness that, left unpaid, may be enforced by an action for payment, and indeed must be timely enforced to avoid the potential bar of the applicable limitation period.

Here the evidence was undisputed that the decedent allowed Ronald to live in her residence without ever demanding that he pay her for the "rental" value of his occupancy.[19] O'Keeffe admitted he had never seen any outstanding instrument of debt owed by Ronald to the decedent. We think more is needed to establish a claim for debt that may be enforced by the decedent's estate after her death, as against an heir. We conclude there was not substantial evidence to prove by a preponderance of the evidence that a creditor-debtor relationship existed between the decedent and Ronald that obligated him to pay for the rental value of his occupancy of the 24th Avenue property during the decedent's lifetime.

To the extent that the award arises from Ronald's misuse of the 24th Avenue property, it is based not on a *debt* but on liability for damages for injury to real property. For these damages to be deemed a debt owed to the estate, which might be offset against

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19 At one point Philip stated that the decedent had "always told us that [Ronald] owed board and room," but this testimony was excluded following a hearsay objection.

Ronald's distributive share, it was first necessary for the decedent to pursue her claim successfully against Ronald, thus giving rise to a relation of judgment creditor and judgment debtor. Moreover, it was necessary for the decedent to do so expeditiously. (See Code Civ. Proc., § 338, subd. (b).)

Finally, there is the problem of the amount awarded. The court chose a figure equal, exactly, to Ronald's distributive share in the proceeds of the sale to the Toms of the 25th Avenue property. An award based on the breach of an agreement to repay an indebtedness need not be calculated with absolute certainty. It must nevertheless have some reasonable basis for its computation, so that the amount may be deemed a reasonable approximation. (See *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398.) Here it appears the trial court set the amount as a matter of convenience for purposes of the offset. There is no basis to conclude that this amount is a reasonable approximation of the indebtedness as to which the court found an "admission" by Ronald.[20]

The trial court's purpose in making this award was a laudable one, to the extent it attempted to resolve, finally, all the disputed claims raised against Ronald. But, the award afforded a recovery on a cause of action not pleaded, and was based on determinations reserved for another court in the stipulation for trial. The award was also not supported by substantial evidence of an indebtedness that might properly be applied to offset an heir's distributive share pursuant to section 6410, as the amount had no

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20 It does not appear that Ronald's testimony in the earlier, unrelated action for fraudulent conveyance may be deemed a binding judicial admission of fact, as distinguished from out-of-court testimony admissible under Evidence Code section 1220. It was not, for example, taken from Ronald's pleadings in the declaratory relief action. (See 1 Witkin, Evidence (4th ed. 2000) Hearsay, §§ 97, 98, pp. 799-801.) Nor does this testimony appear to give rise to a "judicial estoppel" that would preclude Ronald from presenting contrary testimony or other evidence. Among other considerations, such an estoppel would have been proper in this situation only if the court in the prior action for fraudulent conveyance had effectively accepted the position that Ronald took when giving that testimony. (See *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 130-132, 137-139.) Even if we assume the trial court accepted Ronald's prior testimony as true, that testimony was that he owed his mother $175,000 or $300,000. The court's award—in the amount of $114,197—bears no reasonable relation to either amount and there is no other evidence of any indebtedness approximate to this figure.

rational relation to any evidence of actual indebtedness. We conclude the award and the findings on which it is based cannot stand.

Disposition

The judgment is reversed insofar as it rules that Ronald is indebted to the estate in the amount of $114,197, and that this amount must be offset against his interest, as one of the heirs, in the estate assets. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

Swager, J.

We concur:

Marchiano, P. J.

Stein, J.